IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Date of decision : September 25, 2006

1. **Criminal Appeal No. 635-SB of 1996**
   Dharam Pal and another versus State of Haryana

2. **Criminal Appeal No. 824-SB of 1996**
   Nand Kishore versus State of Haryana

Coram: Hon'ble Mr. Justice Virender Singh

Present : Mr. Jitin Talwar, Advocate for
appellants-Dharam Pal and Ranbir

Mr. Rahul Vats, Advocate for appellant Nand Kishore

Mr. Sunil Katyal, Deputy Advocate General, Haryana

Judgment

Vide this judgment, I shall be disposing of the aforesaid two appeals filed by three appellants against the impugned judgment of learned Additional Sessions Judge, Bhiwani dated 16/17.9.1996 vide which they stand convicted under section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'the Act') for a period of ten years each and

to pay a fine of Rs one lac each, in default of payment of fine to further undergo RI for one year.

At the very outset, it is stated by Mr. Sunil Katyal, learned Deputy Advocate General that during the trial all the appellants were on bail and Nand Kishore appellant did not appear before the trial court and ultimately his warrants of arrest were issued. He was arrested in some other case of NDPS Act bearing FIR No. 235 of 1995 registered at Police Station Dabwali in which he ultimately suffered conviction. Criminal Appeal No. 892-SB of 1997 filed by him against the said conviction also stands dismissed by this Court vide judgment dated 6.4.2005. Mr. Katyal then contends that Nand Kishore was also involved in other cases of NDPS at Bikaner (Rajasthan) and, therefore, in order to secure his presence in the instant case, he was produced from Bikaner Jail. Mr. Katyal further contends that may be as per the impugned judgment, Nand Kishore is shown in custody but the factual position is otherwise. On account of delay in his arrest he is still serving his substantive sentence in this case which otherwise relates to the year 1991 whereas in the aforesaid case of 1995 (FIR No. 235 of 1995) in which his appeal also stands dismissed, he has served out his entire sentence.

In brief, the case of the prosecution is that on 2.5.1991, SI Hira Lal PW3 while posted as SHO, Police Station Badhra, along with ASI Jai Singh PW2 and other police officials was present in the area of Badhra at

Kacha rasta on Hassas Khurd to Bandha, when Jagdish son of Surat Singh came from the side of Badhra and met the police party. When they were talking with each other, a four wheeler bearing registration No. HYD-2607 was seen coming from the side of Hassas Khurd which was signalled to be stopped. Appellant Dharam Pal was on the steering of the said four wheeler whereas Nand Kishore and Ranbir were found sitting along with Dharam Pal. A bedding of green colour was seen under the feet of accused Nand Kishore. Since SI Hira Lal suspected some contraband being carried in the said hold-all, he asked Nand Kishore appellant as to whether he wanted to be searched before a Gazetted Officer or a Magistrate. A notice Ex. PD was given in this regard to Nand Kishore, thereupon he gave reply Ex. PE that he did not want to be searched before a Gazetted Officer or a Magistrate and expressed his willingness in police party only. The search of the bedding was then effected. A blanket of black colour was found inside the bedding in which polythene bag was recovered in which opium was found. 250 grams opium was separated out of the recovered quantity as sample and put in a small tin and the remainder was weighed and found to be eight kilograms which was put in a big tin. The sample and the remainder were separately sealed with the seal HL (Hira Lal) and after its use was handed over to ASI Jai Singh PW2. The sample, residue, four-wheeler, bedding, blanket were taken into possession vide memo Ex.PF which was attested by the witnesses. Documents of four wheelers i.e. route permit Ex. P2, diesel

distribution card Ex. P3 were also taken into possession vide separate recovery memo Ex. PG. Ruqa Ex. PH was then sent to the Police Station for registration of the formal FIR upon which formal FIR Ex. PH/1 was recorded. The appellants were formally arrested. Intimation under section 57 of the Act (Ex. PK) was prepared. Statements of the witnesses were recorded at the spot. On reaching Police Station, the sample and the residue were deposited with Ram Singh MHC. On 3.5.1991, the appellants, sample and the case property were produced before DSP Ranbir Singh for verification in the Police Station Badhra who verified the facts from the accused and the PWs. On 7.5.1991, the sample was sent to the Director FSL through Constable Dharambir and as per the report of FSL Ex. PX, it contained opium. After completion of the investigation, the challan was filed against the appellants. They were consequently charged under section 18 of the Act.

In order to substantiate the charge, the prosecution has examined Ranbir Singh, the then DSP Dadri as PW1 who had verified all the facts after the recovery was effected. ASI Jai Singh PW2 and SI Hira Lal are the witnesses to the recovery and they had supported the case of the prosecution. SI Hira Lal was the Investigating Officer and the investigation conducted by him is already depicted in the preceding paras. The prosecution also tendered into evidence affidavits of Constable Dharambir and MHC Ram Singh as Ex. PA and PB respectively to prove

the link evidence. Besides the FSL report Ex. PX was also tendered into evidence. PW Jagdish independent witness has been given up by the prosecution as having been won over by the accused.

The defence of the appellants as emerges from their statement recorded under section 313 of the Code of Criminal Procedure is of denial. Appellant Nand Kishore has taken the plea that no recovery was effected from him and he has been falsely implicated in this case. He had bonafidely taken a lift in four wheeler and he did not know as to what was being carried in the said vehicle. Dharam Pal and Ranbir have also stated that no recovery was effected from them. However, the appellants have not led any evidence in their defence.

After appreciating the entire evidence, all the three appellants have been convicted and sentenced as stated above. Hence, these two appeals by them.

I have heard Mr. Jitin Talwar, Advocate for appellants-Dharam Pal and Ranbir and Mr. Rahul Vats, Advocate for appellant Nand Kishore. Mr. Sunil Katyal, Deputy Advocate General, Haryana has also assisted this Court. I have gone through the entire record very minutely.

Mr. Jitin Talwar states that the prosecution has not been able to prove the conscious possession of the contraband qua Dharam Pal and Ranbir appellants. Dwelling upon his arguments, he submits that may be the recovery of the contraband was allegedly effected from the four wheeler

which was being driven by Dharam Pal and Ranbir was helping him as a cleaner, still the prosecution has not put forth any cogent evidence to show that both the appellants had any nexus with the conscious possession of the contraband allegedly recovered from the hold-all (bedding) on which Nand Kishore appellant was keeping his feet. While strengthening his arguments Mr. Talwar further contends that if one reads notice Ex. PD issued under section 50 of the Act by Hira Lal, the Investigating Officer, it is against Nand Kishore only and from this fact it can be inferred that the Investigating Officer was very much conscious of the fact that the bedding on which Nand Kishore was having control belonged to him only and the present two appellants have nothing to do with that. The learned counsel has also drawn the attention of this Court to the order dated 3.6.1991 wherein while granting bail, the learned Additional Sessions Judge, Bhiwani has observed in para 4 that Dharam Pal and Ranbir are found to be innocent and the prosecution is not going to put up a challan against them. He states that subsequently also another report was prepared by Hira Lal on 12.6.1991 in favour of Ranbir appellant exonerating him but all these facts, are at least indicative of the fact that the prosecution was not clear about the conscious possession of the contraband qua the present two appellants.

Mr. Talwar then submits that as per the document Ex. PJ, (documents of the vehicle) Dharam Pal is not the owner of the vehicle and if at all he had given lift to Nand Kishore upto a particular distance, it cannot

be presumed that he had the knowledge as to what was kept by him in his bedding. He then contends that no doubt, the onus lies on the accused to discharge the presumption envisaged under section 35 of the Act with regard to culpable mental state but it can be discharged through different modes and one of them is that the accused can rely on the material available in the prosecution evidence. According to Mr. Talwar, the case of the prosecution itself is doubtful about the involvement of the present two appellants as is clear from the investigation conducted within a month or so after the alleged recovery especially when the appellants were granted the concession of bail by the trial court and therefore, it can safely be said that the onus has been discharged by them. In support of his contentions, he has relied upon a judgment of Hon'ble Apex Court rendered in **Abdul Rashid Ibrahim Mansuri vs. State of Gujarat** (2000) 2 SCC 523.

Mr. Talwar while drawing the attention of this Court to another order dated 8.11.1996 passed by this Court vide which both the appellants were granted bail after conviction, contends that in the said order also this Court has taken into consideration the investigation conducted qua them.

On the basis of the aforesaid submissions, Mr. Talwar prays for acquittal of both the appellants.

While arguing Criminal Appeal No. 824-SB of 1996 filed by Nand Kishore, Mr. Rahul Vats submits that the conscious possession of the contraband is not proved even qua him. He submits that simply that Nand

Kishore was found keeping his feet on the bedding (hold-all) it cannot be presumed that he was in the conscious possession of the contraband. It could belong to other two persons as well who were also found present in the four wheeler. The learned counsel submits that the appellant has come up with a specific defence that he had taken a lift from Dharam Pal appellant and sat on the rear seat without having any knowledge as to what was being carried in the said bedding. Simply that the notice under section 50 of the Act has been given to Nand Kishore, it cannot be presumed that he alone had the knowledge of the contraband and the said fact would be enough to haul him up. Rather on the other hand it can be said that a complete go-by has been given to the mandatory provisions of the Act, but he can not press his case on section 50 of the Act in the light of the latest judgment of Hon'ble Supreme Court.

Mr. Vats then submits that in the light of Full Bench judgment of this Court rendered in **Kashmir Singh vs. State of Punjab**, 2006(2) RCR (Criminal) 477, a specific question was to be put to Nand Kishore with regard to conscious possession of the contraband. The same is not done and therefore, the presumption under sections 35 and 54 of the Act is not attracted against him. This again is a vital flaw in the case of the prosecution and enough to dislodge it in its entirety.

Mr. Vats then submits that the seal was not handed over to Jagdish PW who was an independent witness and instead it remained with

ASI Jai Singh who also happened to be a witness to the recovery. Therefore, the chances of tampering with the seal or the contraband cannot be ruled out. This again is a serious flaw in the case of the prosecution which can be considered along with the aforesaid draw-backs already pointed out.

Mr. Vats then submits that CFSL form is also not prepared at the spot. Even seal impression chit was also not prepared at the spot as Hira Lal PW3, the Investigating Officer does not talk a word about it and this also creates doubt about the credibility of the search. Strengthening his arguments on this aspect, the learned counsel submits that the case property was not produced before the Ilaqa Magistrate for verification which is serious flaw in the investigation. In support of his contentions, the learned counsel relies upon a judgment of this Court rendered in **Bhola Singh Vs. State of Punjab 2005 (2) RCR (Criminal) 520.**

On the basis of the aforesaid submissions, Mr. Vats prays for acquittal of the appellant Nand Kishore.

Mr. Katyal while controverting the arguments advanced by the learned counsel for all the three appellants submit that the case of the prosecution is proved against all of them as huge quantity of contraband was recovered from a vehicle in which all the three appellants were trapped. The presumption under sections 35 and 54 of the Act has to be drawn against them and until and unless the same is rebutted, they have no escape.

In the case in hand, the onus has not been discharged by any of the appellants beyond doubt and therefore, their conviction deserves to be confirmed. Mr. Katyal then submits that even otherwise the recovery allegedly effected was verified by DSP Sh. Ranbir Singh on the following day who also affixed his seal on the sample and the residue and the same was found intact by the Analyst. Therefore, there was no chance of tampering with the case property at any stage. Even if the seal was not handed over to Jagdish who was not produced as having been won over, the same would not affect the case of the prosecution to the extent of discarding it in its entirety. On the basis of aforesaid submissions, the learned State counsel prays for maintaining conviction of all the three appellants.

Let us take Criminal Appeal No. 635-SB of 1996 filed by Dharam Pal and Ranbir appellants. The case of the prosecution against these two appellants is that Dharam Pal was on the steering of the four wheeler whereas Ranbir was also found sitting in the said vehicle. Ultimately as per the investigation conducted by the prosecution, Ranbir is shown employed as cleaner of that four wheeler. Possession is the core ingredient to be established before the accused is subjected to the punishment under the Act and the prosecution has to prove the nexus between the accused and the contraband allegedly recovered as held in **Avtar Singh vs State of Punjab** 2002(4) RCR (Criminal) 180, wherein their Lordships have observed that the word “possession” no doubt has

different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together. But the minimum requisite element which has to be satisfied is custody or control over the goods.

Onus to prove the absence of culpable mental state lies on the accused. In **Abdul Rashid Ibrahim Mansuri's** case (supra) their Lordships of the Apex Court while dealing with this aspect have observed that the burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that he can rely on the materials available in the prosecution evidence. Next is, in addition to that, he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in the prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that the appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.

While dealing with the presumption envisaged under sections 35 and 54 of the Act, this Court in its Full Bench judgment rendered in **Kashmir Singh**'s case (supra) has observed that the presumptions

envisaged under the aforesaid Act are questions of fact depending upon the case and it appears to be very difficult to lay down any specific mode and method in which the presumption can be raised. Facts in each case are different. Witnesses testify differently. They are subjected to different lines of cross-examination and what finally emerges from the evidence at the trial may be quite different from case to case. Finally it was observed by the Full Bench that no presumption under sections 35 and 54 should be used against the accused unless he has been given an opportunity to rebut the presumptions in his statement under section 313 Cr.P.C. by being called upon to explain the circumstances which give rise to the presumptions. In aforesaid Full Bench judgment, **Abdul Rashid**'s case (supra), **Avtar Singh**'s case (supra), **Narcotic Control Bureau Jodhpur vs. Murlidhar Soni and others**, 2004(2) RCR (Criminal) 900, **State of Punjab vs. Balkar Singh and another** (2004) 3 SCC 582, **Megh Singh vs State of Punjab** (2003) 8 SCC 666, **Madan Lal vs State of H.P.** 2003 (4) RCR (Criminal) 100 and a Division Bench judgment of this Court rendered in **Raj Kumar vs State of Punjab** 2005(1) RCR (Criminal) 70 were also considered.

Following the view taken in the aforesaid judgments and on the basis of the evidence on record, I am of the firm view that the prosecution has not been able to prove conscious possession of Dharam Pal and Ranbir appellants qua the contraband and they have been successful in rebutting the presumption from the investigation conducted by the prosecution agency

itself and therefore, their plea of false implication as asserted in their statements recorded under section 313 of the Code of Criminal Procedure is enough without there being any defence evidence led to strengthen the said plea.

Record reveals that both the aforesaid appellants got bail from the trial court vide order dated 3.6.1991. After the appellants had moved their application for bail, a reply was sought from the prosecution agency which is submitted by ASI Jai Singh PW2 (photostat copy of the reply is on the file) in which it is stated that during investigation, it was found that Nand Kishore only had brought the opium from Bikaner and he had hired the four wheeler for going to his village Bhai Khurd. Carriage was paid in this regard. According to the investigation, the present two appellants had no knowledge about the opium being transported in the four wheeler. Although I am not considering the said reply tendered by Jai Singh ASI for the reason that it is not put to him when he stepped into the witness box, yet the order dated 3.6.1991 vide which both the appellants were granted bail can certainly be considered wherein it is observed as under:-

> "Keeping in view the fact that the police has reported that these accused Dharampal and Ranvir are innocent and they are not going to put a challan against them and also keeping in view the fact that the main accused has been released on bail by the order of the Hon'ble High Court, I do not find any reason to

detain any longer these accused Dharampal and Ranvir. Hence, they are ordered to be released on bail in the sum of Rs 10,000/- each with one surety each in the like amount to the satisfaction to the Ilaqa Magistrate."

The aforesaid facts go to show that right from the very beginning the prosecution was doubtful about the involvement of the present two appellants. In this regard, Ex. DA another report prepared by Hira Lal PW3, the Investigating Officer is also relevant in which it is again mentioned that the four wheeler was hired by Nand Kishore after paying carriage which was being driven by Dharam Pal appellant and 8.250 kgs of opium was recovered from the possession of Nand Kishore. Ranbir appellant who was Ex-Army personnel employed as Cleaner of the four wheeler was found innocent by the Investigating Officer. Ex. DA was put to Hira Lal in his cross-examination and he admitted it to be correct. May be Ex. DA talks about the innocence of Ranbir appellant only but the entire investigation conducted was not showing any nexus of the present two appellants qua the contraband allegedly recovered from the four wheeler. All these factors if taken collectively, speak volumes of the innocence of the present appellants.

Another fact which also strengthens the plea of the present two appellants is that when four wheeler was stopped and Nand Kishore was

found keeping his feet on the bedding (hold-all), Hira Lal, the Investigating Officer suspected him only carrying the contraband and that is the reason that notice under section 50 of the Act was given to him and not to the other two appellants. Although provisions of section 50 of the Act are not attracted in this case as the recovery was not effected from the person, yet issuance of notice to Nand Kishore appellant only can also be taken as a ground to hold that even at that stage, the Investigating Officer was doubtful about the involvement of the present two appellants. This fact can also be considered in their favour.

I have also gone through the order of this Court dated 8.11.1996 vide which while suspending substantive sentence of the present appellants, the investigation conducted by the prosecution was taken into consideration observing that the case was for bail. However, the said order cannot be made the basis of the acquittal as it was by way of an interim relief. Any how, after having rescanned the entire evidence in its right perspective, I can not eschew observing that the prosecution has miserably failed to establish the conscious possession of the present two appellants qua the contraband which is the core ingredient before conviction is maintained. Resultantly, the impugned judgment of conviction and sentence qua Dharam Pal and Ranbir deserve to be set aside. Ordered accordingly.

So far as Criminal Appeal No. 824-SB of 1996 filed by Nand

Kishore is concerned, the arguments advanced by Mr. Rahul Vats have not convinced me. In order to prove conscious possession qua him, the prosecution is relying upon the testimony of ASI Jai Singh PW2, SI Hira Lal, the Investigating Officer PW3 and I do not find any infirmity on any material aspect which would shatter their evidence. On the search of the four wheeler a bedding of green colour was seen under the feet of Nand Kishore appellant and this is the reason that notice under section 50 of the Act was also given to him. No doubt SI Hira Lal had joined one Jagdish as an independent witness who during trial was given up as having been won over and the fact that the seal was also not handed over to him and instead remained with ASI Jai Singh PW2 only. But the said weaknesses are not that vital so as to discard the case of the prosecution doubting very huge recovery of the contraband allegedly effected from the appellant. There is no hard and fast rule that court should always look for an independent corroboration. It depends upon the facts of each case. If the evidence of official witnesses is un-shaken, the absence of any corroboration from the source of independent witness is not fatal. In **Mohd. Iqbal vs. State of Punjab** 2003(1) RCR (Criminal) 316, a Division Bench of this Court while dealing with the a case of narcotic where huge recovery of contraband was effected, observed that independent witness being won over and given up is not an un-common practice and the prosecution should not be blamed for that. The evidence of the official witnesses cannot be rejected on that

ground alone when they had no motive to falsely implicate the accused. In the case in hand, no motive whatsoever has been projected by Nand Kishore appellant for his false implication. Even otherwise, it is not believable that the police officials were out to falsely implicate him.

I am appreciating the case of the prosecution qua Nand Kishore appellant yet from another angle as well. The investigation of the entire case was verified on 3.5.1991 by Sh. Ranbir Singh PW1 who was then posted as DSP Dadri. In his examination-in-chief he stated that on 3.5.1991, he along with police officials went to Police Station Badhra for verification of this case and on that day, the accused, the case property including the sample were produced before him for verification by SI Hira Lal. He then stated that he checked the case property and the sample and thereafter affixed his own seal bearing seal impression 'RS' on the sample and the residue. SI Hira Lal PW3 who was the Investigating Officer of this case and was also SHO of Police Station Badhra for the purpose of compliance of section 55 of the Act informed his senior police official (DSP) to verify the facts. This is the reason that Sh. Ranbir Singh , DSP had affixed his own seals on the case property and the sample after due verification. This very fact demolishes the argument advanced by learned counsel for the appellant with regard to handing over of seal to ASI Jai Singh. In the FSL report also, while giving description of the parcel, the concerned official of the Forensic Science Laboratory has written that one

sealed cloth parcel sealed with five seals of HL and two seals of RS was received by him. The sample was sent without any delay on 7.5.1991 as is clear from the affidavits tendered by the two police officials or even from the report of the FSL Ex. PX. No doubt FSL form was not prepared at the spot by SI Hira Lal which ordinarily should be done in all the cases of recovery as observed in **Bhola Singh**'s case (supra), but in my view, each case has to be decided on its own facts and the aforesaid flaw can certainly be considered as one of the weaknesses along with other material flaws. In the case in hand, once I am of the considered view that the prosecution has been able to prove the conscious possession of the contraband qua the present appellant, the aforesaid fact alone would not dent the case of the prosecution to the extent of dislodging it in its entirety especially when the DSP Ranbir Singh the senior official had put his own seal on the sample and kept the same with him only. I find no good reason to doubt him.

In my view, the learned counsel at the same time, cannot derive any benefit from the judgment of Full Bench rendered in **Kashmir Singh**'s case (supra) with regard to presumption of sections 35 and 54 of the Act. I have gone through the statement of Nand Kishore recorded under section 313 Cr.P.C. In the third question it has been specifically put to him that the bedding of green colour on which he was keeping his feet was searched in which a bag of plastic wrapped in a blanket of black colour was recovered. After conducting the search of the bag, the opium was recovered

from it. No doubt in so many words it has not been put to the accused that he was found in conscious possession of the contraband but if one reads the entire statement recorded under section 313 Cr.P.C. all the incriminating evidence was put to him. It was for him to rebut the same and in his reply to the last question, the attempt made by him to rebut the presumption is that he had taken a lift in the four wheeler and was sitting on the back side of the said vehicle. In my view, simple denial by the accused in this case would not amount to rebutting the presumption. After-all he had been implicated in a case in which heavy recovery was effected. He could show his grouse by knocking the doors of high ups which is not done. He kept silent throughout. Therefore, his failure to explain the circumstances in which the recovery was effected is enough to resort to the presumption under section 35 of the Act which relates to the culpable state of mind. The conscious possession of the appellant qua the contraband, in my view, is, thus proved to the hilt by the prosecution.

No other point has been urged before me with regard to Nand Kishore appellant.

As a sequel to the aforesaid discussion, in my firm view, the prosecution has been able to prove the charge of section 18 against Nand Kishore appellant beyond any shadow of reasonable doubt and therefore, the impugned judgment of conviction and sentence passed qua him deserves to be upheld. Ordered accordingly.

The net result is that the impugned judgment of learned Additional Sessions Judge, Bhiwani is partly disturbed in the terms that Criminal Appeal No. 635-SB of 1996 filed by Dharam Pal and Ranbir is hereby allowed whereas Criminal Appeal No. 824-SB of 1996 filed by Nand Kishore is dismissed. Appellants Dharam Pal and Ranbir are stated to be on bail during the pendency of the instant appeal and they are now discharged of their bail bonds. Appellant Nand Kishore shall serve the remainder of his substantive sentence.

All quarters concerned be informed.

(Virender Singh)
Judge

September 25,2006
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IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Date of decision : September 25, 2006

Criminal Appeal No. 824-SB of 1996

Nand Kishore versus State of Haryana

Coram: Hon'ble Mr. Justice Virender Singh

Present: Mr. Rahul Vats, Advocate for the appellant

Mr. Sunil Katyal, Deputy Advocate General, Haryana

Judgment

For detailed judgment, see Criminal Appeal No. 635-SB of 1996, Dharam Pal and another versus State of Haryana.

(Virender Singh)
Judge

September 25,2006
'dalbir'